

DEBRA WONG YANG
United States Attorney
THOMAS P. O'BRIEN
Assistant United States Attorney
Chief, Criminal Division
MARK AVEIS (California Bar. No. 107881)
Organized Crime & Terrorism Section
1500 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-4477
FAX: (213) 894-3713
Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

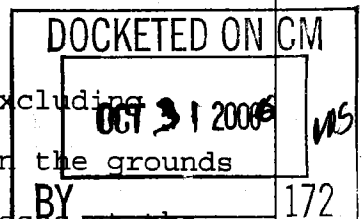
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) No. CR 02-938(E) -RGK
)
Plaintiff,) GOVERNMENT'S OPPOSITION TO PAMELA
) GRIFFIN'S MOTION TO QUASH
v.) SUBPOENA; GOVERNMENT'S CROSS-
) MOTION TO EXCLUDE WITNESS
JOHN STINSON, et al.,)
)
Defendants.) Hearing Date: October 30, 2006
Time: 1:30 p.m.

Plaintiff, United States of America, by and through its
counsel of record, respectfully opposes the motion to quash the
trial subpoena served on Pamela Griffin on the following
grounds: (1) the attorney-client privilege has been waived; (2)
the marital communications privilege has been waived; and (3)
movant has failed to show a basis for the spousal testimonial
privilege

The government also cross-moves for an order excluding
Pamela Griffin as a witness under Fed.R.Evid. 615 on the grounds
that, under Rule 615, the Court shall exclude witnesses at the
request of a party, and no exception to Rule 615 exist.

Finally, at the least, the government requests that the
Court deny Pamela Griffin's motion without prejudice and subject



4670

1 to refiling at such time as the Court may determine that her
2 testimony may not be permitted.


3 This opposition and cross motion is based on the attached
4 memorandum of points and authorities, the Court file, and such
5 other evidence as may be received.

6 Dated: October 27, 2006

Respectfully submitted,

7 DEBRA WONG YANG
8 United States Attorney

9 THOMAS P. O'BRIEN
10 Assistant United States Attorney
11 Chief, Criminal Division

12 
13 MARK AVEIS
14 Assistant United States Attorney
15 Attorneys for Plaintiff
16 United States of America
17
18
19
20
21
22
23
24
25
26
27
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. PROCEDURAL POSTURE

3 On August 28, 2006, the government subpoenaed Pamela Jo
4 Griffin, defendant Robert Lee Griffin's wife and attorney, to
5 testify at trial during the government's case in chief. Pamela
6 Griffin then filed a motion to quash the subpoena, claiming
7 Pamela Griffin cannot be compelled to testify because of her
8 privilege as both a wife of defendant and as defendant Griffin's
9 attorney. The motion was ordered "not filed" due to movant's
10 counsel's failure to set the matter for a date certain hearing.
11 Counsel then obtained an order shortening time, setting the
12 motion for hearing on October 30, 2006. The government received
13 the order shortening time on October 25, 2006. On October 26,
14 the Court permitted the government to file its opposition by
15 close of business on October 27, 2006.

16 II. SUMMARY

17 Defendant Robert Lee Griffin is currently on trial in this
18 Court for racketeering conspiracy, 18 U.S.C. § 1962(d), and for
19 committing violent crimes in aid of racketeering, 18 U.S.C.
20 § 1959 ("VICAR"). As the Court well knows, the indictment
21 alleges that Griffin was a member of the Aryan Brotherhood
22 ("AB") and that the AB operated its organized crime ring through
23 a "commission" of senior AB members.

24 For the purposes of this opposition and cross-motion, there
25 can be no honest dispute that defendant Griffin was a member of
26 the AB commission and, as such, was a controlling member of the
27 AB. The dispute, if any, however, concerns when defendant
28 Griffin was a commissioner. The government intends to prove

1 that defendant Griffin was a member of the commission or, at
2 least, was a controlling member of the AB, at all relevant
3 times. That is, defendant Griffin, in his controlling position,
4 participated not only in the AB racketeering conspiracy at all
5 relevant times but also participated in the AB-originated orders
6 to kill Arthur Ruffo (victim in VICAR count four) and Aaron
7 Marsh (victim in VICAR count five) in 1996 and 1997,
8 respectively.

9 Part of the government's proof of defendant Griffin's
10 involvement in the AB comes from defendant Griffin's contacts
11 with the California Department of Corrections and Rehabilitation
12 ("CDC") through his duly authorized representative, namely, his
13 wife and attorney, Pamela Griffin. Thus, as more fully
14 described below, defendant's wife and attorney, through her
15 contacts with the CDC and others, is an important government
16 witness.

17 The same contacts Pamela Griffin had with the CDC form part
18 of defendant Griffin's stated and pending claim¹ that he
19 "withdrew" from the AB at a time such that the statute of
20 limitations is a complete bar to the charges against him.

21 Thus, Pamela Griffin is both a government and a defense
22 witness. Her testimony is admissible in the government's case
23 in chief, for the reasons stated below, not subject to any
24 privilege, and her motion should be denied.

25 Alternatively, the government suggests that the Court deny
26 the motion without prejudice, subject to refileing after the

27
28 ¹ Defendant Griffin filed a motion to dismiss on the
ground of the statute of limitations. That motion is
currently pending and under submission.

1 Court has heard sufficient evidence from which the Court may
2 determine whether or not Pamela Griffin can or should be called
3 as a witness.

4 At the very least, as with any other likely witness, she
5 should be excluded from Court during trial.

6 III. FACTS

7 Defendant Griffin's wife is an attorney certified to
8 practice law in California under California Bar Number 128760.
9 She represented defendant Griffin in or about 1997. She
10 contacted the CDC and other law enforcement officials on behalf
11 of her client to explain defendant Griffin's involvement in the
12 AB. As but one example, Pamela Griffin wrote a letter - dated
13 October 13, 1997, to CDC, under her attorney letter head, in
14 which she transmitted a document purportedly written by
15 defendant Griffin, or with his consent. In part of the
16 document, defendant Griffin stated that, "although the term
17 'commission' has been used in some cases to describe the
18 structure of AB leadership, numerous other terms have been
19 thrown around as well. These terms were generally the product
20 of people's imaginations." See letter attached hereto as
21 Exhibit A. In another letter to the District Attorney of Del
22 Norte County, dated August 18, 1998, Pamela Griffin stated that
23 "my client, Robert Griffin would like to clear up certain facts
24 . . ." concerning testimony from another prison inmate that may
25 have implicated defendant's involvement in the AB. Nothing in
26 either documents indicated that the documents were intended to
27 answer any law enforcement inquiry, nor compelled by law
28

1 enforcement actions. Clearly, the writings were voluntarily
2 conveyed to a third party.

3 The government seeks to call Pamela Griffin as a witness to
4 testify about the subject matter of these communications because
5 they are crucial to the elements of the RICO conspiracy under 18
6 U.S.C. § 1962(d), which the government must prove beyond a
7 reasonable doubt.² Among other elements, under section 1962(d),
8 the defendant must have conspired to participate in conduct of
9 an enterprise's affairs through the pattern of racketeering
10 activity. In this case, the AB is the enterprise in question.
11 The first writing is clearly a false exculpatory statement, as
12 the government will introduce substantial evidence that the AB
13 commission was not the product of "people's imaginations."
14 Therefore, defendant Griffin's status as an AB member, the
15 existence of the "commission," and the subject matter of
16 communications at issue are crucial to the case and the
17 government should be permitted to examine the witness about the
18 creation and other aspects of these writings.

19 IV. ARGUMENT

20 A. Whether to Quash a Subpoena Must Be Determined On A Case-
21 By-Case Basis

22 There is no bright line rule governing the standard a
23 federal court must follow in deciding whether to quash a
24

25 ² The government views Pamela Griffin's motion to quash
26 as without merit, not only for the reasons stated
27 herein, but because it is obviously designed to "smoke
28 out" the likely areas of examining Mrs. Griffin, who is
clearly a hostile witness. Therefore, as for the
particular questions that the government will ask, the
government requests leave to submit to the Court a
summary of the intended questions in camera.

1 subpoena or grant a privilege. Rather, a court must analyze the
2 particular circumstances on a case-by-case basis as the
3 standards below show.

4 Under the Federal Rules of Criminal Procedure, courts may
5 grant a motion to quash a subpoena if compliance with the
6 subpoena would be oppressive or unreasonable. See Fed. R.
7 Crim. Proc. 17(c)(2).³ When weighing the unreasonableness or
8 oppressiveness of a subpoena of a witness who has an otherwise
9 privileged relationship with the defendant, the Ninth Circuit
10 has explained that there is no "mechanical rule enabling an
11 escape from case-by-case judgment." See In re Grand Jury
12 Subpoena to Nancy Bergeson, 425 F.3d 1221, 1225-26 (9th Cir.
13 2005) (addressing whether a client's current attorney could
14 testify against the client on non-privileged information before
15 the grand jury).⁴

18 ³ While this sub-section expressly applies to subpoenas
19 for documents or production of documents, the Ninth
20 Circuit also has applied this to subpoenas for witness
21 testimony, otherwise known as subpoenas ad
22 testificandum. See In re Grand Jury Subpoena to Nancy
23 Bergeson, 425 F.3d 1221, 1225 (9th Cir. 2005). In
24 general, however, quashing a subpoena ad testificandum
25 is "'very rare because until the witness is asked
specific questions, usually there is nothing on which
to base a motion to quash'." See Weinman v. Stuart
Cable, 427 F.3d 49, 53 (1st Cir. 2005) (quoting 9 James
Wm. Moore et al., Moore's Federal Practice,
§45.04[3][a] (3d ed. 2005)).

26 ⁴ Specifically, In re Grand Jury Subpoena to Nancy
27 Bergeson, the Ninth Circuit explained that the
28 "defendant is not automatically entitled to an order
quashing such a subpoena merely because the government
cannot show that [any] other source of testimony exists
and that there is a compelling need for it to obtain an
indictment." 425 F.3d at 1225-26.

1 When it comes to privileges, the Federal Rules of Evidence
2 also allow courts the flexibility to develop rules of privilege
3 on a case-by-case basis to "leave the door open to change". See
4 Trammel v. United States, 445 U.S. 40, 47 (1980) (the rules of
5 evidence "acknowledge the authority of the federal courts to
6 continue the evolutionary development of testimonial privileges
7 in federal criminal trials 'governed by the principles of the
8 common law as they may be interpreted ... in light of reason and
9 experience.'" (citing Fed. R. Evid. 501).⁵ Accordingly,
10 federal courts must evaluate the applicable boundaries of both
11 the attorney-client privilege and the spousal privilege on a
12 case-by-case basis.

13 Here, it is neither unreasonable nor oppressive to subpoena
14 Pamela Griffin to testify for three basic reasons. First, both
15 Pamela Griffin and defendant Griffin have voluntarily disclosed
16 information regarding defendant's status as an AB member,
17 waiving both the marital confidential communication privilege
18 and the attorney-client privilege. See below. Second, partial
19 waiver of the privilege on one subject matter equals complete
20 waiver of the privilege on that particular subject matter.
21 Hence, defendant cannot pick and chose what evidence the
22 government, or defendant, may introduce in light of any
23

24 ⁵ The rule states in pertinent part: "Except as otherwise
25 required by the Constitution of the United States or
26 provided by Act of Congress or in rules prescribed by
27 the Supreme Court pursuant to statutory authority, the
28 privilege of a witness, person, government, State, or
political subdivision thereof shall be governed by the
principles of the common law as they may be interpreted
by the courts of the United States in light of reason
and experience."

1 privilege. Furthermore, Pamela Griffin cannot use a blanket
2 assertion of the broader adverse spousal testimonial privilege
3 (hereinafter "testimonial privilege")⁶ to avoid the truth.
4 Rather, the court should determine whether the broad testimonial
5 privilege applies on a question-by-question basis, analyzing
6 whether the testimony at issue is in fact adverse to defendant
7 Griffin and whether the need for probative evidence in the
8 search for truth outweighs the need to protect marital harmony
9 between Pamela Griffin and defendant. Therefore, the
10 government's subpoena of Pamela Griffin is not unreasonable nor
11 oppressive, as the arguments below will show.

12 Finally, Pamela Griffin is clearly a witness who should be
13 excluded during trial, as with any other witness. In light of
14 the evidence, there is no question that, at the least, she could
15 be called by defendant as part of his announced affirmative
16 defense of withdrawal. It would be unreasonable and unfair to
17 provide her with a special exemption to sit through the trial
18 before she testified.

19 B. The Attorney-Client Privilege Was Voluntarily Waived

20 The attorney-client privilege does not apply to
21 communications voluntarily written, spoken, or disclosed to a
22 third party. See United States v. Rockwell Int'l, 897 F.2d
23 1255, 1265 (3d Cir. 1990) ("The attorney-client privilege does
24 not apply to communications that are intended to be disclosed to
25

26 ⁶ The adverse spousal privilege allows a witness spouse
27 to refuse to adversely testify against a non-witness
28 spouse - a privilege that is separate and distinct from
the marital privilege protecting confidential
communications. See United States v. Tsinnijinnie, 601
F.2d 1035, 1037 (9th Cir. 1979).

1 third parties or that in fact are so disclosed."); see also
2 Hearn v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975) ("... all
3 communications between the individual defendants and the
4 attorney general, which were shared with third persons, whether
5 communicated in the presence of such persons or lodged in files
6 that were accessible to others, cannot be deemed confidential
7 for purposes of the attorney-client privilege and are not
8 protected from discovery.").

9 Under this analysis, the attorney-client privilege does not
10 protect any communication regarding defendant Griffin's status
11 as an AB member that attorney Pamela Griffin voluntarily
12 disclosed on behalf of her client, defendant Griffin. For
13 example, Exhibit A was voluntarily sent on behalf of her client
14 to clarify any potential implication that defendant Griffin was
15 involved in what the CDC clearly thought was an organized
16 criminal enterprise which operated through a controlling
17 "commission." Since this writing was voluntarily sent by Pamela
18 Griffin on behalf of defendant Griffin, the attorney-client
19 privilege does not protect the writing itself. See United
20 States v. Flores, 679 F.2d 173, 177-78 (9th Cir. 1982) (finding
21 that a letter that admitted the defendant's possession of guns
22 sent to the City of San Jose could be admitted as evidence
23 because it "was voluntarily mailed by [defendant] and his
24 attorney at their election."); see also United States v.
25 Clawson, 831 F.2d 909, 911-12 (9th Cir. 1987) (defendant's
26 affidavit admitting ownership of pistol seized by police was
27 admissible because defendant voluntarily made the affidavit).
28

1 Accordingly, the court should compel Pamela Griffin to
2 testify about this and other similar writings as well as the
3 same subject matter that was discussed in this writing (i.e.,
4 defendant Griffin's status as an AB member or the "commission").
5 Neither Defendant Griffin nor Pamela Griffin can invoke the
6 attorney-client privilege to protect information that they
7 willingly offered to other parties.

8 C. The Marital Communications Privilege Was Voluntarily Waived

9 While the marital privilege protects private
10 communications⁷ between spouses because they are presumed to be
11 made in confidence, see Edwards v. Lamarque, 439 F.3d 504, 512
12 (9th Cir. 2005), it too can be waived if disclosed by the spouse
13 claiming the privilege, see United States v. Lilley, 581 F.2d
14 182, 189 (8th Cir. 1978). "Disclosure is generally inconsistent
15 with confidentiality and, 'courts need not permit hide-and-seek
16 manipulation of confidences in order to foster candor.'" SEC v.
17 Lavin, 111 F.3d 921, 933 (D.C. Cir. 1997).

18 As the case law above shows, any communication between
19 defendant Griffin and Pamela Griffin, as his wife, that was
20 voluntarily disclosed to a third party is not protected by the
21 marital privilege to confidential communications. Furthermore,
22 the Ninth Circuit has already held that the privilege does not
23 apply to communications between Pamela Griffin and defendant
24

25
26 ⁷ The Ninth Circuit applies this marital confidential
27 communications privilege only to (1) words or acts
28 intended as communication from one spouse to another;
the couple has irreconcilably separated; and (3)
communications that are confidential. See United
States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992).

1 Griffin even if they "intended" them to be confidential when the
2 law requires third-party disclosure. See United States v.
3 Griffin, 440 F.3d 1138, 1144-45 (9th Cir.) ("There is no free
4 standing marital communications privilege, under either federal
5 or state law, allowing a California prisoner to send
6 confidential letters from prison to his or her spouse.") cert.
7 denied 2006 U.S. LEXIS 6155 (U.S. Oct. 2, 2006).

8 In Griffin, the Ninth Circuit found that allegedly
9 confidential letters sent between Pamela Griffin and defendant
10 were not protected by the marital communications privilege
11 because, as a matter of law, the Bureau of Prisons had the right
12 to review letters between husband and wife. In other words, the
13 Ninth Circuit refused to allow Pamela Griffin and her husband to
14 skirt the law by attempting to use the attorney-client privilege
15 as a cloak to hide non-privileged marital communications. Id.
16 at 1145 ("... we hold that Griffin has no right to protect from
17 disclosure to the government as privileged marital
18 communications those portions of the letters to his
19 wife/attorney that were improperly included in the envelopes on
20 which he wrote 'Attorney at Law'"). Accordingly, Pamela Griffin
21 cannot use the marital privilege to protect her from testifying
22 about confidential communications already disclosed. See Lavin,
23 111 F.3d at 933.

24

25 D. Partial Waiver Equals Total Disclosure on Subject Matter

26 As noted above, disclosure of a confidential communication
27 waives the protection of the privilege as to that communication
28 specifically. However, a party cannot partially waive the

1 protection of a privilege on a specific subject matter for self-
2 serving purposes. Id. at 933 (a party may not "selectively
3 disclose part of a privileged communication in order to gain an
4 advantage in litigation").

5 For instance, under the marital privilege, partial waiver
6 of the confidence protecting a particular subject matter waives
7 the total protection of communications on that same subject
8 matter. Id. ("the purpose of the marital privilege is to
9 protect the privacy of marital communications, a purpose that is
10 not served by protecting communications that have been
11 deliberately disclosed, even if only in part")⁸ (citations
12 omitted); see also United States v. Yerardi, 192 F.3d 14 (1st
13 Cir. 1999) (in determining waiver by conduct, a court must
14 decide whether the privilege holder's conduct in waiving part of
15 a privileged communication makes it unfair to allow subsequent
16 assertion of the privilege ... "[s]uch a pick-and-choose
17 approach may seem unfair in general or because it distorts the
18 evidence that is presented to the factfinder.").

19 The same reasoning applies to the attorney-client
20 privilege. See Permian Corp. v. United States, 665 F.2d 1214,
21 1221 (D.C. Cir. 1981) ("courts have been vigilant to prevent
22 litigants from converting the privilege into a tool for
23

24 ⁸ The D.C. Circuit specifically said that "the
25 considerations that support a strict approach to waiver
26 in the attorney-client context would appear to apply as
27 well in the marital context: while both privileges
28 serve to promote important public interests by
encouraging full and frank communications within
special relationships, they must be narrowly construed
because of their adverse effect on full disclosure of
the truth." SEC v. Lavin, 111 F.3d 921, 929 (D.C. Cir.
1997) (citations omitted).

1 selective disclosure"). Therefore, voluntary disclosure of part
2 of an attorney-client privileged communication is a waiver of
3 the remainder of the privileged communication about the same
4 subject. See Handgards, Inc., v. Johnson & Johnson, 413 F.
5 Supp. 926, 929 (N.D. Cal. 1976); see also Lee Nat'l Corp. v.
6 Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) (When a party
7 freely and voluntarily reveals a particular subject matter to a
8 third person, the party cannot assert the privilege as grounds
9 for refusing to identify other occasions when the same subject
10 matter was disclosed. "It would be patently unfair for a client
11 to disclose those instances which please him and withhold all
12 other occasions."). In fact, the D.C. Circuit has held that the
13 privilege is lost even if the disclosure is inadvertent. See In
14 re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("the
15 confidentiality of communications covered by the privilege must
16 be jealously guarded by the holder of the privilege lest it be
17 waived.")

18 Moreover, the attorney-client privilege can be implicitly
19 waived when a defendant asserts a claim that, in fairness to the
20 opposing party, requires examination of the protected
21 communications. See Chevron Corp. v. Penzoil Co., 974 F.2d
22 1156, 1162-63 (9th Cir. 1992) (a defendant cannot invoke the
23 attorney-client privilege to deny plaintiff access to the very
24 information that plaintiff must refute); see also United States
25 v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) ("A defendant
26 may not use the privilege to prejudice his opponent's case or to
27 disclose some selected communications for self-serving
28 purposes.").

1 Here, defendant Griffin has expressly stated that he plans
2 to assert the affirmative defense of withdrawal from the AB
3 prison gang and its conspiracy. (Def.'s Notice of Mot. And Mot.
4 to Dismiss Count Two Based on the Statute of Limitations, at 7,
5 July 24, 2006). In raising this defense, defendant Griffin has
6 waived his attorney-client privilege on communications
7 addressing his status as an AB prison gang member, a critical
8 issue to the outcome of this case. See Chevron, 974 F.2d at
9 1162-63. The court should not allow defendant Griffin and his
10 wife and former attorney, Pamela Griffin, to use privileges as a
11 shield to hide information especially if they plan to attack
12 with the very same information.

13 Under both privileges then, partial waiver of the
14 confidence of a subject matter equals total waiver of the
15 privilege as to that same subject matter. Pamela Griffin is the
16 wife of defendant Griffin, her client. As defendant Griffin's
17 attorney, she voluntarily disclosed information relevant to this
18 case (i.e. defendant's involvement and status as an AB member)
19 to third parties on behalf of defendant, as the letter addressed
20 above shows. Since voluntary disclosure waives both the
21 attorney-client privilege and the spousal privilege protecting
22 confidential communications, the government seeks Pamela
23 Griffin's testimony regarding communications on the same subject
24 matter. Therefore, the subpoena seeking this testimony is
25 neither unreasonable nor oppressive.

26 E. The Court Should Deny Blanket Testimonial Privilege

27 Pamela Griffin also asserts the testimonial privilege, a
28 privilege that is separate and distinct from the marital

1 privilege protecting confidential communications.⁹ See United
2 States v. Tsinnijinnie, 601 F.2d 1035, 1037 (9th Cir. 1979) The
3 marital testimonial privilege sweeps broader than any other
4 testimonial privilege. See Trammel, 444 U.S. at 51, 53 (holding
5 that a witness spouse had a privilege to refuse to testify
6 adversely against his or her spouse without the consent of non-
7 witness spouse). In Trammel, the Court held that the
8 testimonial privilege protects testimony of not only
9 confidential communications but also "evidence of criminal acts
10 and of communications made in the presence of third persons."
11 Id. at 51. Therefore, it appears that this testimonial
12 privilege trumps the marital confidential communications
13 privilege.

14 However, before a spouse can invoke this broad testimonial
15 privilege, the court must determine for each particular question
16 (1) whether the testimony is adverse to the non-witness spouse
17 and, if so, (2) whether application of the privilege promotes
18 sufficiently important interests that outweigh the need for
19 probative evidence in the administration of criminal justice.
20 See United States v. Van Cauwenberghe, 827 F.2d 424, 431 (9th
21 Cir. 1987) (court refused to apply a blanket assertion of
22 privilege where the witness failed to demonstrate that the
23 testimony was adverse to her spouse's penal interests); Trammel,
24 444 U.S. at 51. Pamela Griffin, however, argues that she can
25 invoke this testimonial privilege across the board. Clearly,
26 she cannot do so.

27
28 ⁹ This privilege is also referred to as the anti-marital
facts privilege.

1 1. The Court Must Examine Particular Questions at Issue

2 In Van Cauwenberghe, the Ninth Circuit found that the
3 testimonial privilege is "not a general one: It must be asserted
4 as to particular questions." 827 F.2d at 431. In other words,
5 the privilege does not protect the "very act of testifying."
6 See also In re Grand Jury, 111 F.3d 1083, 1086 (3d. Cir. 1997).
7 In In re Grand Jury, the Third Circuit held a witness spouse in
8 contempt of court for refusing to answer questions before the
9 grand jury and continuing to assert her spousal testimonial
10 privilege even though the government had promised immunity. Id.
11 at 1089. The Third Circuit explained that the testimonial
12 privilege is not absolute: "'it does not shield all testimony
13 nor does it bar procedures that may protect the spouse from the
14 effect of the testimony'." Id. at 1088 (quoting In re
15 Snooninan, 502 F.2d 100, 112 (1st Cir. 1974)).

16 Therefore, Pamela Griffin cannot assert the testimonial
17 privilege as a reason to refuse to testify on general grounds.
18 Rather, she has the burden of showing she can assert the
19 privilege on a question-by-question basis. Then, once asserted
20 on each particular question, the Court must decide whether to
21 grant the privilege after determining whether the testimony
22 would be adverse and whether marital harmony between Pamela and
23 defendant Griffin is a public good that outweighs the need for
24 probative evidence in the search for truth under these
25 circumstances. Trammel, 444 U.S. at 50.

26 2. The Court Must Find Testimony Adverse

27 The Ninth Circuit has held that the testimonial privilege
28 only applies to testimony that is adverse to the non-witness

1 spouse. See Van Cauwenberghe, 827 F.2d at 431 ("the marital
2 privilege ... 'is not available unless the anticipated testimony
3 would in fact be adverse to the nonwitness spouse.'"); see also
4 In re Grand Jury, 111 F.3d 1083, 1087 (3rd Cir. 1997) ("Courts
5 have consistently recognized that the privilege only applies to
6 testimony that is 'adverse' to the other spouse.").

7 Therefore, the Court must determine whether the testimony
8 is adverse if and when it arises at trial on a question-by-
9 question basis. Consequently, if the Court determines that the
10 testimonial privilege applies, then the government will refrain
11 from inferring in the presence of the jury that Pamela Griffin's
12 invocation of this testimonial privilege could be construed as
13 adverse to defendant.¹⁰ The court may also avoid any prejudice
14 to defendant by asking for a showing of exactly what testimony
15 that Pamela Griffin objects to and/or hold a hearing out of the
16 presence of the jury to determine whether or not a claim of the
17 privilege is bona fide. See In re: Grand Jury Matter, 673 F.2d
18 688, 693-94 (3d Cir. 1982) (a district court has authority to
19 hold a hearing to address when the link between one spouse's
20 testimony and its potential adverse impact on the other spouse
21

22 ¹⁰ This would comply with Pamela Griffin's concerns in her
23 motion to quash as well as United States v. Sanchez,
24 176 F.3d 1214, 1223 (9th Cir. 1999) (Allowing the
25 prosecutor to reveal in the presence of the jury that
26 the husband's wife could not be made to testify against
27 him improperly suggested to the jurors that they could
28 legitimately infer that her testimony would be adverse
to his defense). However, according to the authority
in Pamela Griffin's own motion, concerns of improper
inferences that may be prejudicial to the defense can
be sufficiently cured by jury instructions to disregard
those inferences. See Namet v. United States, 373 U.S.
179, 187-88 (1963).

1 may be too attenuated). Since the government will submit its
2 questions to the court in camera to protect any privilege that
3 may exist, the court has discretion to determine the extent of
4 adversity of the testimony the government seeks on each
5 particular question and decide accordingly.

6 Pamela Griffin argues, however, that even testimony against
7 co-defendants would be adverse to her husband because of the
8 RICO conspiracy charges against him. See Motion, at 6-7.

9 Plainly, this argument should be rejected as speculative.
10 Movant has not offered any evidence to support this claim and it
11 is contradicted by the evidence which shows that Pamela
12 Griffin's writings were not adverse to her client's or his co-
13 defendant's interest.

14 In addressing this issue, the government again requests the
15 court to review the application of the testimonial privilege on
16 a question-by-question basis because, even if the testimony is
17 adverse, the interests in its application must be balanced
18 against the interest of the administration of justice, as
19 addressed below.

20 3. Court Must Strictly Construe Privilege

21 If the court determines that the testimony on a particular
22 question is adverse, the court still must determine whether the
23 public good of protecting the harmony between Pamela Griffin and
24 defendant Griffin outweighs the public good in the
25 administration of justice in this case. As the Supreme Court
26 said in Trammel, the testimonial privilege must be "strictly
27 construed and accepted 'only to the very limited extent that
28 permitting a refusal to testify or excluding relevant evidence

1 has a public good transcending the normally predominant
2 principle of utilizing all rational means of ascertaining
3 truth.'" Trammel, 444 U.S. at 50 (quoting Elkins v. United
4 States, 364 U.S. 206, 234 (1960) (Frankfurter, J. dissenting)).
5 In essence, the Supreme Court established a balancing test to
6 determine "whether the privilege against adverse spousal
7 testimony promotes sufficiently important interests to outweigh
8 the need for probative evidence in the administration of
9 criminal justice." Id. at 51.

10 One circumstance in which courts have denied the
11 testimonial privilege is when the marriage was entered into for
12 the purpose of invoking the testimonial "marital" privilege
13 only. See e.g. United States v. Saniti, 604 F.2d 603, 604 (9th
14 Cir. 1979). Courts have also refused to apply the testimonial
15 privilege when a crime has been committed against either a
16 spouse or a child of either spouse. See, e.g., United States v.
17 Allery, 526 F.2d 1362, 1367 (8th Cir. 1975). Courts, however,
18 are split on whether they deny the testimonial privilege when
19 the witness spouse participated in the crime at issue. See
20 United States v. Van Drunen, 501 F.2d 1393, 1396-97 (7th Cir.
21 1974) (refusing the application of the testimonial privilege to
22 a witness spouse who participated in the crime); but see United
23 States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) ("we
24 hold that there is no joint participant exception to the
25 testimonial privilege") overruled on other grounds.

1 The facts of the case at hand appear unique.¹¹ While
2 analysis of this balancing test would depend on each question at
3 issue, in general it appears that the need for probative
4 evidence in the search for justice in stopping an enterprise
5 from committing murder outweighs the need for marital harmony
6 between Defendant Griffin and Pamela Griffin for several reasons
7 under these circumstances.

8 First, the couple has already tried to cloak the truth from
9 not only the Bureau of Prisons but also the Ninth Circuit by
10 expressly sending letters under the "Attorney at Law" heading to
11 make some communications appear confidential when they did not
12 rightly deserve this protection. See Part IV(B) infra. The
13 Ninth Circuit did not allow this. Id. Neither should this
14 court. Moreover, Pamela Griffin, as defendant Griffin's, had
15 chosen to voluntarily disclose some information on defendant's
16

17 ¹¹ It appears that there is only one case addressing
18 whether an attorney-spouse can assert the broader
19 testimonial privilege and refuse testimony on any topic
20 even if that spouse may have been a necessary witness.
21 See Barbee v. The Luong Firm, 126 Wash. 148, 157
22 (Wash. Ct. App. 2005). In that case, the husband was
23 the current attorney for the wife and the trial court
24 disqualified him so he could be a witness. The
25 appellate court, however, found that the husband could
26 invoke the broader spousal testimonial privilege and
27 therefore reversed the trial court's disqualification.
28 Id. at 160. The Barbee case, however, differs
significantly from the case at hand for two reasons.
First, the issue addressed was whether the husband
should be disqualified as the wife's current lawyer.
In the case at hand, Pamela Griffin is not defendant
GRIFFIN's current attorney. Second, the Barbee court
was following Washington state law, which specifically
requires the consent of the spouse to waive the
testimonial privilege. Under federal law, the U.S.
Supreme Court has clearly held that the witness spouse
does not need the consent of the non-witness spouse.
See Trammel v. United States, 444 U.S. 40, 53 (1980).

1 status as an AB prison gang member. She should not now be
2 allowed to deny the court full disclosure on his status as an AB
3 member because she wants to assert the broader testimonial
4 privilege. A court should not allow her to pick and choose the
5 truth because it would "permit hide-and-seek manipulation of
6 confidences." See Lavin, 111 F.3d at 933.

7 V. THE COURT SHOULD EXCLUDE PAMELA GRIFFIN AS A WITNESS

8 Notwithstanding Pamela Griffin's motion, the Court has not
9 been presented with sufficient evidenced to entirely rule out
10 Pamela Griffin as a witness. Thus, unless and until such a
11 determination may be made, the Court should exclude Pamela
12 Griffin from the courtroom throughout the trial in fairness to
13 the government. See Fed. R. Evid. 615;¹² see also Charles v.
14 United States, 215 F.2d 825, 828 (9th Cir. 1954) (trial court's
15 failure to exclude witness from trial to prevent witness from
16 shaping his or her testimony to match that given by other
17 witnesses was in error). If she is allowed to watch others
18 testify, she could easily shape her testimony to match that of
19 the others in support of her husband. See Charles, 21 F.2d at
20 827.

21 Moreover, the risk of prejudice to the government is
22 especially great where, as a practical matter, at this point no
23 defendant can or should be required to waive calling Pamela
24 Griffin without first hearing the government's case.

25 ///

26
27 ¹² The rule provides in pertinent part: "At the request of
28 a party the court shall order witnesses excluded so
that they cannot hear the testimony of other witnesses,
and it may make the order of its own motion."

1 VI. CONCLUSION

2 For the foregoing reasons, the court should deny Pamela
3 Griffin's motion to quash the subpoena as neither neither
4 unreasonable nor oppressive. At the least, Pamela Griffin
5 should be excluded as a witness and her motion should be denied
6 without prejudice.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Pamela J. Griffin
Attorney at Law
P.O. Box 4963
Omaha, NE 68104

Lt. Barry J. O'Neill
Institutional Gang Investigator
Pelican Bay State Prison
5904 Lake Earl Drive
Crescent City, CA 95531

EXHIBIT

A

Found
6/27/06
J. J. J. J. J.

Pamela J. Griffin
Post Office Box 4963
Omaha, Nebraska 68104
(402) 222-5670

Attorney at Law
Calif. Bar No. 128760

October 13, 1997

Lt. Barry J. O'Neill
Institutional Gang Investigator
Pelican Bay State Prison
5904 Lake Earl Drive
Crescent City, CA 95531

Re: Robert Lee Griffin, B-26484

Dear Lt. O'Neill:

[REDACTED] side of
[REDACTED] ns

Also enclosed are paper copies of both these documents, along with various items marked as attachments. These are organized as follows: the "memo" document serves as the main cover document which references all the attachments. The "statement" document is included as an attachment to the memo. The attachments include many I sent you before, but I thought it would be easier for everyone if I just started with a new set, since I added some new materials and rearranged the order somewhat.

As you can see, the "memo" document doesn't include any kind of opening, heading or closing. This material can be used and reorganized in whatever format you want. I assume that you will not change Robert's statement without his understanding and consent.

I'm not sure if this is what you had in mind. If you have any questions or concerns, please contact either me or Robert.

Sincerely,

Pam Griffin
Pamela J. Griffin

cc: Robert Lee Griffin

EXHIBIT 25-1

Attachment 4

EXHIBIT 25-2

STATEMENT RESPONDING TO CONFIDENTIAL DISCLOSURES

**Robert Lee Griffin
B-26484**

[REDACTED]

[REDACTED]

[REDACTED] ny

[REDACTED]

[REDACTED] de

[REDACTED]

EXHIBIT 25-3

[REDACTED]

7/23/87: Memorandum lists me as part of Commission leadership. [REDACTED]

[REDACTED] Although the term "commission" has been used in some cases to describe the structure of AB leadership, numerous other terms have been thrown around as well. These terms were generally the product of people's imaginations. I never accepted any title or formal power - it was attributed to me by staff and inmates alike, but I looked upon it as jailhouse fantasy. Several times I informed staff that I cannot control inmates without using force and I won't do that. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT 25-5

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The foregoing information is true and correct to the best of my knowledge.

Robert Lee Griffin
Robert Lee Griffin

EXHIBIT 25-6